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December 12, 2003

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, D.C. 20554

**Re: Virginia Cellular, LLC Petition for ETC Designation;
Highland Cellular Telephone, Inc. Petition for ETC
Designation; Federal-State Joint Board on Universal
Service, CC Docket No. 96-45**

Dear Ms. Dortch:

ALLTEL Communications, Inc. ("ALLTEL"), Sprint Corp. ("Sprint"), and Western Wireless Corp. ("Western Wireless") respectfully submit this *ex parte* letter in support of the petitions for designation as eligible telecommunications carriers ("ETCs") in Virginia submitted by Virginia Cellular, LLC ("Virginia Cellular") and Highland Cellular Telephone, Inc. ("Highland Cellular") (collectively, the "Virginia Applicants"). This letter addresses Virginia Cellular's letter dated Nov. 12, 2003; the letter from a group of incumbent local exchange carriers ("ILECs") led by CenturyTel, Inc. (collectively, the "Mid-Size ILECs") dated Nov. 18, 2003; and the Virginia Applicants' responsive letter dated Nov. 26, 2003.

The Commission's decision on these ETC applications will set precedent for future applications, and is likely to be influential in context of the Joint Board's consideration of the ETC designation process in the *Portability* proceeding. ALLTEL, Sprint and Western Wireless urge the Commission to bear in mind that some of the voluntary commitments offered by the Virginia Applicants may have general applicability, but others should not necessarily be applied to other ETC applicants or converted into standards of general applicability. Moreover, we urge the Commission to reject the anti-competitive arguments of the Mid-Size ILECs.

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Applications in Non-Rural ILEC Areas Are Consistent *Per Se* With the Public Interest, and No Special “Public Interest” Analysis is Required. As a preliminary matter, the Commission should be mindful that the Virginia Applicants have sought ETC designation in rural ILEC areas, but many of the standards and procedures that apply in rural ILEC areas do not apply to applications for ETC designation in areas served by non-rural ILECs. The Commission need not conduct a “public interest” analysis for applications for ETC designation only in non-rural ILEC service areas. Rather, the Commission should adhere to its precedent that, “[f]or those areas served by non-rural telephone companies, . . . designation of an additional ETC based upon a demonstration that the requesting carrier complies with the statutory eligibility obligations of section 214(e)(1) is consistent *per se* with the public interest.” ^{1/} Indeed, to apply a “public interest” analysis (or the equivalent) to non-rural ETC applications would render meaningless the special, additional public interest test that the statute applies to rural ILEC areas, for which regulators “*may*” designate an additional ETC if they “find that the designation is in the public interest.” 47 U.S.C. § 214(e)(2), (e)(6). By contrast, with respect to applications such as these to serve non-rural ILEC areas, the statute requires that regulators “*shall*” designate carriers that meet the statutory criteria. *Id.* ^{2/}

ILEC Obligations Unrelated to ETC Criteria Must Not Be Imposed on Competitive Carriers. Section 214(e) imposes certain obligations upon all ETCs, which must be implemented in a competitively neutral manner. It is important to distinguish, however, between the statutory obligations of ETCs, which apply equally to ILECs and competitive ETCs, versus ILEC requirements that have nothing to do with ETC obligations. It would make no sense to apply requirements in the latter category to competitive ETCs. For example, the Mid-Size ILECs propose to require competitive ETCs “to provide the same minimum level of service (service quality, reliability, network support, customer service, and coverage) to all customers . . . (based on what the state requires of the . . . ILEC serving the area).” Mid-Size ILECs Nov. 18 Letter at 5. This would blatantly

^{1/} *Federal-State Joint Board on Universal Service, Cellico Partnership d/b/a/ Bell Atlantic Mobile Petition for Designation as an Eligible Telecommunications Carrier*, 16 FCC Rcd 39, 45, ¶ 14 (Com. Car. Bur. 2000).

^{2/} Acknowledging the differing standards that apply to applications to serve rural and non-rural ILEC service areas, ALLTEL has requested that its pending applications be bifurcated to facilitate expeditious consideration of the requests for designation in non-rural ILEC service areas. Sprint’s pending applications seek designation only in non-rural ILEC service areas.

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violate technological and competitive neutrality: wireless networks are not engineered to provide calling throughput identical to that provided by wireline copper-loop networks – just as ILECs’ stationary networks are incapable of providing the mobile coverage that wireless networks offer. (We discuss Virginia Cellular’s voluntary commitments relating to service quality below.) Similarly, there is no policy basis to require competitive ETCs to offer “basic dial-tone” under the same calling plan – including a regulatory-specified flat rate for so-called “local” calling in a specified area, free incoming calls, and the like. *Id.* Rate regulation is needed to constrain anti-competitive pricing by ILECs with market power, and is unnecessary with respect to carriers whose rate plans are controlled by competitive market forces – and for that reason the Commission has repeatedly rejected calls to impose such requirements on competitive carriers. ^{3/} The Mid-Size ILECs’ proposals are a thinly disguised effort to preclude wireless carriers from ever receiving support, and the Commission must reject them.

All ETCs – Including Incumbents – Are Subject to the Statutory ETC Criteria. With respect to requirements included in the statutory criteria (applicable to all ETC applications, non-rural as well as rural), Sections 214(e) and 254 of the Act already obligate all ETCs in this regard, so voluntary commitments to comply with these statutory obligations are somewhat superfluous. Nonetheless, ALLTEL, Sprint and Western Wireless believe that three of the voluntary commitments offered by Virginia Cellular are generally consistent with the statutory requirements, and therefore would not be inappropriate to impose as ETC conditions: (1) the company’s commitment to advertise its universal service offerings; (2) its commitment to respond to all reasonable requests for service within a company’s ETC service area; and (3) its commitment to utilize all high-cost funds to support, maintain, and upgrade facilities used to provide the supported services. (We discuss each of these items in greater detail below.)

Competitively-Neutral Advertising Obligations. The same statutory ETC obligations also apply to ILECs, and the Commission should make it clear that, to the extent regulators enforce these requirements with respect to competitive ETC applicants, they should enforce them equally with respect to

^{3/} Moreover, since mobile wireless carriers’ costs are incurred on a more traffic-sensitive basis than ILECs, whose copper loops incur non-traffic-sensitive costs, it would violate competitive neutrality to require wireless carriers to emulate ILEC calling plans, with no charge for incoming minutes. Moreover, consumers would be harmed by the imposition of impose the ILECs’ small local calling areas on wireless carriers, which typically offer much larger (frequently national) calling areas for minutes included in basic calling plans.

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incumbent ETCs. For example, Virginia Cellular voluntarily offered to provide notices about its Lifeline service at social service agencies' offices; and to publicize its facilities construction operations and the link between such construction and improved service. Virginia Cellular Nov. 12 Letter at 5. However, any such interpretation of the advertising requirement of Section 214(e)(1)(B) should not be applied to competitive ETCs if it does not apply with equal force to ILECs.

Competitively-Neutral Obligations Regarding Extension of Service. Similarly, Virginia Cellular's commitments regarding extension of service to unserved areas 4/ are generally consistent with the Commission's decision in the *South Dakota Preemption Declaratory Ruling* that an ETC is obligated to extend service to all customers in its designated service area after it receives designation, not beforehand. 5/ However, other wireless carriers (and ILECs) may satisfy this requirement in somewhat different ways; Virginia Cellular's own specific means to achieve this end must not be converted into a general requirement or a criterion for all ETCs.

Voluntary Construction Commitments May Be Considered in the Public Interest Analysis, But Should Not Be Required. ALLTEL, Sprint and Western Wireless are somewhat concerned about the Virginia Cellular voluntary commitments regarding expending high-cost funds to improve facilities and reach out to unserved areas. Virginia Cellular Nov. 12 Letter at 4-5. To be sure, the Act requires all ETCs to use all funds only to support, maintain, and upgrade facilities used to provide supported services. ALLTEL, Sprint and Western Wireless agree that all ETCs, including ILECs as well as competitive ETCs, should be required to certify, and if necessary, demonstrate, that they are using funds properly. 6/ But

4/ Virginia Cellular commits that it will provide service immediately to customers within existing network; and that, in response to service requests from customers that reside in areas with no coverage, the company will, in the following order, (a) modify or replace customer equipment; (b) provide special network equipment (roof antennas, etc.); (c) modify nearest cell site; (d) consider other network adjustments; (e) consider offering resold service of other carriers; (f) consider deploying additional cell site, cell extender, or repeater; or (g) notify the customer and file reports with the regulatory agency if none of the above can be implemented Virginia Cellular Nov. 12 Letter at 3-4.

5/ Federal-State Joint Board on Universal Service; Western Wireless Corporation Petition for Preemption of an Order of the South Dakota Public Utilities Commission, Declaratory Ruling, 15 FCC Rcd 15168 (2000) ("South Dakota Preemption Declaratory Ruling").

6/ A number of ILECs have argued that competitive ETCs should be required to make detailed demonstrations as to the uses of the support funding. *See, e.g.,* Mid-Size ILECs Nov. 18

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this does not mean that competitive ETCs should be required to use all high-cost funding for incremental capital expenditures, since ILECs are not subject to the same requirement; they can use funds for operating expenditures and for depreciation costs related to capital expenditures incurred in the past. Also, ILECs' construction programs are generally not subject to advance regulatory approval; competitive ETCs' plans should not be either. While Virginia Cellular chose to file its construction plans publicly, many competitive ETCs view such data as highly sensitive and, if they file it at all, would request confidential treatment.

Thus, ETC applicants should not be required to make any showing regarding construction plans; at most, any such information voluntarily offered by an ETC applicant should be considered as a factor in the "public interest" analysis. This is consistent with a recent decision by the Vermont Public Service Board, which concluded that, "[w]hile the Board believes that investment in capital construction is a useful indicator of an ETC's progress toward ubiquity of coverage, we do not believe that it is critical to demonstrating compliance with ETC certification." ^{7/} One of the greatest "public interest" benefits of designating wireless carriers as ETCs is that high-cost funds will be used to improve and upgrade wireless network facilities, and thereby give consumers in rural areas an improved wireless calling experience, including a more robust ability to place potentially life-saving E-911 calls from their mobile phones.

Ex Parte at 5. But by the logic of this argument, and given that ILECs receive the lion's share of support, one could readily argue that much more substantial auditing burdens should be imposed on the ILECs themselves.

For example, Western Wireless, for its part, has proposed that, in the case of rate-of-return carriers, periodic independent audits should be required to verify proper classification and reporting of loop counts and network investments, compliance with cost accounting manuals and controls, compliance with affiliate transaction rules, proper booking of costs and recording of interest expenses, and other accounting matters. See Western Wireless Petition for Rulemaking Regarding the Elimination of Rate-of-Return Regulation, CC Docket No. 96-45, RM No. 10822 (filed Oct. 30, 2003) at 30-31.

^{7/} *Designation of Eligible Telecommunications Carriers Under the Telecommunications Act of 1996; In re: RCC Atlantic, Inc. d/b/a/Unicel*, Docket 5918, Order (Vt. Pub. Serv. Bd., Nov. 14, 2003), at 41. This order is attached to the October 26, 2003 *ex parte* filing by the Virginia Applicants, who correctly observe that the Mid-Size ILECs mischaracterize the Vermont Public Service Board's decision by focusing on conditions discussed in a Hearing Officer's proposal for decision, as incorporated into an Initial Decision dated June 26, 2003, rather than addressing the Board's Final Order dated Nov. 14, 2003. See Virginia Applicants' Oct. 26 Letter at 4 & n.9.

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Voluntary Commitments Regarding Consumer Service May Be Considered As Part of the Public Interest Analysis. Similarly, ALLTEL, Sprint and Western Wireless support the Virginia Cellular commitments to comply with the CTIA Consumer Code for Wireless Services and to provide annual reports regarding consumer complaints. Virginia Cellular Nov. 12 Letter at 1-3. ALLTEL, Sprint and Western Wireless already adhere to the CTIA Consumer Code. However, we submit that neither of these voluntary commitments should be converted into mandatory requirements. Rather, they should be considered as among the many potentially relevant factors in a “public interest” analysis for ETC applications in rural ILEC areas. In that regard, ALLTEL, Sprint and Western Wireless agree with Virginia Cellular, which cautions that any service quality requirements as part of the ETC designation process should be adopted through a rulemaking proceeding, not imposed *ad hoc* in the course of individual ETC designation proceedings. We also agree with Virginia Cellular that the service quality rules that apply to ILECs were adopted to protect consumers from monopoly business practices, *not* as a *quid pro quo* for ETC designation. Virginia Cellular Nov. 12 Letter at 2-3.

Importantly, ALLTEL, Sprint and Western Wireless demur to Virginia Cellular’s statement that “The Commonwealth of Virginia is fully empowered to enact statutes and conduct rulemaking proceedings to impose service quality standards on CMRS carriers should it so choose.” Virginia Cellular Nov. 12 Letter at 3. Such statements should not be part of the ETC designation process. Whether or not a given state has jurisdiction over particular aspects of CMRS services or operations depends on legal factors that have nothing to do with ETC designation; ^{8/} and a wireless ETC applicant cannot voluntarily confer such jurisdiction where it does not already exist. Moreover, state commissions generally do not possess the technical expertise to evaluate or oversee service quality issues related to wireless system performance; in part for this reason Congress entrusted

^{8/} See, e.g., *Bastien v. AT&T Wireless Serv., Inc.*, 205 F.3d 983, 988 (7th Cir. 2000) (“As the Supreme Court recognized in *Central Office Telephone*, a complaint that service quality is poor is really an attack on the rates charged for the service and may be treated as a federal case regardless of whether the issue was framed in terms of state law. * * * In addition to rates and service, federal regulations expressly dictate the terms under which a provider may enter a new market. The act makes the FCC responsible for determining the number, placement and operation of the cellular towers and other infrastructure. * * * Congress has expressed its decision that these areas be reserved exclusively for federal adjudication.”). See also *Wireless Consumers Alliance*, 15 FCC Rcd 17021, 17036-37, ¶ 28 (2000).

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such matters to the FCC. ^{9/} Most fundamentally, competition among carriers creates extremely strong market incentives for each carrier to offer the best service quality possible. As Wireless Bureau Chief John Muleta recently stated, such customer service requirements are “something the competitive marketplace will take care of.” ^{10/}

In sum, ALLTEL, Sprint and Western Wireless urge the Commission to proceed to issue orders designating the Virginia Applicants as ETCs, and to grant other pending applications. However, the Commission must take care not to convert a few carriers’ specific voluntary commitments into general requirements applicable to all carriers. Any conditions imposed on competitive ETC applicants (or criteria taken into account in the rural “public interest” analysis) must be competitively neutral, consistent with the statutory criteria, and directly related to policy goals of the universal service provisions of the Act, which strongly favor competition and consumer choice.

^{9/} See 47 U.S.C. § 332(c)(3).

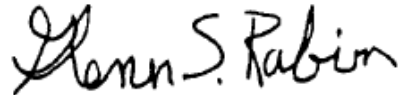
^{10/} “Experts Disagree on Costs and Benefits of Wireless Regulations,” *Communications Daily*, Dec. 8, 2003, at 7. See also Virginia Cellular Nov. 12 Letter at 3 (“It scarcely bears mention that service quality rules were not enacted as a quid pro quo for ILECs being designated as ETCs. Service quality rules are in place across the country for ILECs because almost without exception they are monopoly carriers. Consumers require appropriate protection from monopoly business practices. The discipline that is applied by robust marketplace competition is far preferable to regulation. Introduction of effective competition will lessen the need for full monopoly regulation on ILECs in Virginia.”)

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Respectfully submitted,

A handwritten signature in black ink, reading "David Sieradzki". The signature is written in a cursive style with a large, looped 'D' and a trailing flourish.

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Counsel for Sprint Corp. and
Western Wireless Corp.

A handwritten signature in black ink, reading "Glenn S. Rabin". The signature is written in a cursive style with a large, looped 'G' and a trailing flourish.

Glenn S. Rabin
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